No. 83-1752

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1983

HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota; MINNESOTA PUBLIC UTILITIES COMMISSION; and MINNESOTA DEPARTMENT OF PUBLIC SERVICE,

Petitioners,

vs.

NORTHERN STATES POWER COMPANY and MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Respondents,

IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AS AMICUS CURIAE

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May 25, 1984

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The National Association of State Utility Consumer Advocates ("NASUCA") moves for leave to file the attached brief amicus curiae in support of the request of the Petitioners, Hubert H. Humphrey, III, Attorney General of the State of Minnesota, Minnesota Public Utilities Commission, and Minnesota Department of Public Service that a writ of certiorari issue to the Supreme Court of the State of Minnesota. The consent of counsel for the Petitioners to the filing of a brief amicus curiae by the Department has

been obtained. The consent of Respondent Minnesota Public Interest Research Group to the filing of a brief amicus curiae by NASUCA has also been obtained. These letters of consent accompany this brief and are being filed in the Office of the Clerk. Respondent Northern States Power Company has refused to consent to the filing of an amicus brief by NASUCA; however, this motion should still be granted for the reasons below. The brief is being submitted in a timely manner and in compliance with Supreme Court Rule 36.1.

NASUCA is a national organization composed of officials in 32 states, who are directed by law to represent the interests of consumers of regulated public utility services before regulatory commissions. The interest of NASUCA in this matter, therefore, results from its members' statutory authority to represent the interests of consumers in civil proceedings involving review of electric and other matters which may affect these consumer interests. See, e.g. S.C. CODE ANN. §37-6-607 (Cum. Supp. 1983). The effect of the decision of the Supreme Court of the State of Minnesota affirming the order of the District Court for the State of Minnesota is to curtail the ability of South Carolina and other states to secure for rate-

payers quality service at reasonable rates. Electric utilities would be able to circumvent State retail utility rate regulation previously recognized as a lawful exercise of authority. Accordingly, NASUCA is best qualified to represent the interests of ratepayers who are not parties to this action but whose interests will be directly affected by the ultimate resolution of the issues presented herein.

WHEREFORE, NASUCA prays for leave to file a brief amicus curiae in support of the Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The members of NASUCA are authorized by law to represent the interests of consumers of regulated public utility services before regulatory commissions. For example, the South Carolina Department of Consumer Affairs ("Department") is an agency of the State of South Carolina. The Consumer Advocate and Division of Consumer Advocacy within the

Department have been created to protect the interests of consumers in civil proceedings involving review or enforcement of an agency action that may substantially affect such interest of consumers. S.C. CODE ANN. §37-6-607 (Cum. Supp. 1983). The Consumer Advocate likewise provides legal representation at his sole discretion of consumer interests before the South Carolina Public Service Commission ("SCPSC") when it undertakes to fix rates or prices for consumer products or services or to enact regulations or establish policies related thereto. S.C. CODE ANN. §37-6-604 (Cum. Supp. 1983). Because the District Court of the State of Minnesota has preempted State regulatory authority over the costs of the abandoned Tyrone Energy Park and the Minnesota Supreme Court has upheld this determination,[1] the interests which the Department and other

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[1] Northern States Power Company v. Minnesota Public Utility Commission, et. al, File No. 452088 (Ramsey County Dist. Ct., August 3, 1982), aff'd subnom, Northern States Power Company v. Minnesota Public Utility Commission, 344 N.W.2d 374 (Minn. 1984).

NASUCA members are obligated to protect[2] are significantly and unquestionably affected.

If this decision is allowed to stand, it will continue to have serious consequences by precluding the Department from urging the SCPSC to continue to exercise its lawful authority regarding electric generating plant abandonment losses and the setting of other electric rates, charges, and methodologies for intrastate ratemaking purposes as intended by both the SCPSC electric statutes and Part II of the Federal Power Act of 1935. S.C. CODE ANN. §58-27-10 et seq. (Law Co-op. 1976) and 16 U.S.C. §824 et seq. (1976, Supp. V 1981).

Finally, NASUCA's interest will not be adequately represented by existing parties. Respondent Northern States Power Company seeks denial of the Petition for Writ of Certiorari.[3] This is obviously adverse to NASUCA members' statutory interests regarding intrastate rates for electric service. Petitioners are a state public utilities commission, public service department, and

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[2] See, e.g., OHIO REV. CODE ANN. §491.02 (Page 1983) and 71 PA. CONS. STAT. ANN. §309.2(a) (Purdon 1983).

[3] The Minnesota Public Interest Research Group has been named as a Respondent in accordance with Supreme Court Rule 19.6; however, it supported Petitioners before the Minnesota Supreme Court.

the Minnesota Attorney General, who by statute replaced the Minnesota Office of Consumer Services as a petitioner. Thus, only NASUCA as amicus curiae can adequately represent the interests of other interested consumers of electric service. NASUCA is honored to have the opportunity to support the issuance of a writ of certiorari in a case of such significant historical importance.

SUMMARY OF ARGUMENT

This Court should issue a writ of certiorari in this case, because the Minnesota Supreme Court has incorrectly interpreted the meaning of an amendment to a coordinating agreement between two Northern States Power Company affiliates and the meaning of the agreement itself. The Minnesota court construed these to constitute a wholesale rate, thus having a preemptive effect over State regulation as to an NSP purchased power adjustment that had been rejected by the Minnesota Public Utilities Commission. This incorrect interpretation will lead to extraordinary usurpation of traditional State regulatory authority if it is allowed to stand. Even if the Minnesota court's interpretation might otherwise be considered valid, it is nonetheless

untimely, since FERC has primary jurisdiction over regulation of wholesale rates; and FERC has not acted affirmatively to attempt implementation of this rate at the retail level for either NSP or other affected utilities.

ARGUMENT

I. ACCEPTANCE BY FERC OF AN AMENDMENT TO A COORDINATING AGREEMENT DID NOT ESTABLISH A WHOLESALE ELECTRIC RATE THAT MUST BE PASSED THROUGH TO RETAIL RATEPAYERS.

Section 201 of the Federal Power Act establishes the jurisdictional limits of the Federal Energy Regulatory Commission ("FERC" or "Commission")[4] as being restricted to the "transmission of electric energy at wholesale in interstate commerce." 16 U.S.C. §824(a) (1976, Supp. V 1981). Section 205 provides for the filing of schedules by utilities

> showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classification, and services.

16 U.S.C. §824d(c) (1976, Supp. V 1981). The Commission has promulgated a regulation under §§205 and 206 defining "rate schedule" as a

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[4] Formerly, the Federal Power Commission.

> statement of (1) electric service as defined in paragraph (a) of this section,[5] (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contractual document, purchase or sale agreement, lease of facilities, tariff or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof.

18 C.F.R. 35.2(b) (1983) (footnote omitted) (emphasis added).

Against this statutory and regulatory framework the FERC accepted Respondent Northern States Power Company's (NSP) amended

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[5] Paragraph (2) states "electric service" means: the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. "Electric service" shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements as defined herein, "electric service" is without regard to the form or payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

18 C.F.R. 35.2(a) (1983).

coordinating agreement. Neither the amendment to the agreement nor the agreement itself concerns a sale of electric energy as wholesale. [6] Neither contains a "rate" or "price" for energy or service, as that term has been construed by this Court in Permian Basin Area Rate Cases, 390 U.S. 747, 793 and 797 (1968), and made applicable to the Federal Power Act by reference to Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571, 577 n.7 (1981). Neither clearly contains the component found in a "rate schedule" of "electric service" as defined by 18 C.F.R. 35.2 (1983).

Despite these basic and unambiguous defects, however, the Minnesota Supreme Court erroneously ruled that FERC acceptance of the amendment established a wholesale rate and that implementation of this rate required a purchased power expense adjustment to be included in setting retail electric rates. 344 N.W.2d at 382. A writ of certiorari must be issued to correct this error of statutory construction.

The term "schedules" is spelled out in §205 of the Federal Power Act and is further construed in 18 C.F.R. 35.2(b). The only

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[6] This term means a "sale of electric energy to any person for resale." 16 U.S.C. §824(d) (1976).

harmonious construction of these is that the NSP amendment - or agreement itself for that matter - constitutes a "contract" concerning classifications or practices that may affect NSP's rates or charges. That is, the amendment falls within the category described in 18 C.F.R. 35.2(b)(3). Even if Respondent NSP argues that "electric service" is contemplated in the documents, the position that acceptance of the amendment established a wholesale rate fails, because "rates" are not included in either the amendment or original agreement.

FERC's use of the conjunction "and" clearly shows that all three components of 18 C.F.R. 35.2(b) are required before any such amendment could properly be construed as a "rate schedule" in a way that could then be labelled a wholesale rate. When construed in this manner, the regulation is sound and tracks the statutory language that utilities are to file schedules "together with" all contracts. 16 U.S.C. §824(c).

FERC has typically used terms like "coordinating arrangements" or "coordination services" as "shorthand terms in the industry for certain contractual arrangements." The Electric and Water Board of the City of Frankfort, Kentucky v. Kentucky Utilities

Company, 23 Fed. Power Serv. (MB)5-496, 498 (1982). As FERC has recognized, "Although there are a variety of arrangements, the essence of all these (coordinating agreements) is the agreement by two or more generating utilities to exchange surplus capacity and energy." Id. FERC has also taken the position that these "agreements (to coordinate), like any rate schedule, must comport with the standards of Section 205 and 206 of the Act." The Electric and Water Plant Board of the City of Frankfort, Kentucky v. Kentucky Utilities Company, 23 Fed. Power Serv. (MB)5-234, 241 (1980) (emphasis added). FERC did not say "like any other rate schedule." Thus, FERC, itself, has recognized a distinction between a coordinating agreement and a rate schedule. Certain filing requirements apply to these agreements, which are "like" rate schedules. If FERC were stating that the agreements were rate schedules this would appear to conflict with the literal language of 18 C.F.R. 35.2(b). Note, however, that 18 C.F.R. 35.1 (1982) refers to a variety of types of rate schedules.

In its analysis of the amended agreement, the Minnesota Supreme Court effectively substituted judicial abdication for judicial

review. It relied on possible sales of energy without record evidence of any and thus erred. See NEPCO Municipal Rate Committee v. Federal Energy Regulatory Commission, 668 F.2d 1327, 1349 (D.C. Cir. 1981), cert. denied on other grounds, 457 U.S. 1117 (1982) (Court interpretation of contract precluded by absence of record evidence). The Minnesota Court further erred by placing particular weight on the affiliated nature of these possible wholesale transactions. See id. at 1346-1347 (Court of Appeals recognized Rhode Island Utility Commission's discretion to allocate affiliate Narragansett Electric Company's tax expense to intrastate retail operations). But cf., Narragansett Electric Company v. Harsch, 368 A.2d 1204, 1206 (R.I. 1977), wherein the Rhode Island Supreme Court has upheld the Rhode Island Commission's finding that a tax expense was an interstate cost to be recovered from wholesale, not retail, ratepayers. Thus, another State Supreme Court has recognized a State commission's discretion to characterize a utility's expenses as interstate or intrastate in nature.

Finally, the Minnesota court improperly relied on FERC's conclusion that the amended agreement did establish rates and charges by

formula, 344 N.W.2d at 381, and thereby erroneously affirmed a district court decision ordering inclusion of NSP's purchase power adjustment. The portion of the FERC order quoted merely states on its face that the State must treat the allocated costs as expenses in determining retail rates. Id. It does not clearly state that these expenses must be classified as above-the-line expenses, that is, expenses includable in retail operating income.

II. THE MINNESOTA COURT IS PRECLUDED FROM DEEMING AN AMENDED AGREEMENT A WHOLESALE RATE IN ADVANCE OF SUCH CONSTRUCTION AND ATTEMPTED IMPLEMENTATION BY FERC.

Even if this amended agreement can be construed as a wholesale rate, FERC - not the Minnesota Supreme Court - has primary jurisdiction if not exclusive jurisdiction over review and implementation of such rate.[7] As

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[7] Conversely, the States are left free to regulate prices for retail sales. Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964); see Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, U.S. , 103 S.Ct. 1905 (1983) (PSC's assertion of jurisdiction over cooperative not shown to be violative of Commerce Clause (U.S. Const. art. I, §8, cl.3) or preempted by Federal Power Act or administrative actions thereunder).

a wholesale rate, the evaluation and implementation of it would logically become the responsibility of FERC, not State commissions. Regulation of this type of purchased power expense would thus be outside the ambit of State regulation.

The Minnesota Court relied heavily on a FERC determination that formula rates were established via the agreement. 344 N.W.2d at 381. However, the FERC has not taken affirmative steps by order or rulemaking proceeding to implement such rates at the retail level and thereby preempt state regulatory authority. Contra, Computer and Communications Industry Association v. Federal Communications Commission, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, U.S. , 103 S.Ct. 2109 (1983) (FCC action upheld detariffing customer premises equipment and preempting State authority). Since FERC has not attempted to exercise any authority by implementing this so-called "wholesale rate" at the retail level as the FCC has in the telecommunications area, the matter was not properly before the Minnesota court for interpretation.

Application of the primary or exclusive jurisdiction doctrines to the instant case

support this conclusion. See Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (Interstate Commerce Commission is body originally to entertain reasonableness of railroad rate). Weighing the various factors of traditional State and Federal regulatory authority, promotion of consistency and uniformity, and benefits of the agency's expertise support deferral of judicial action until FERC determines it has authority to implement and then attempts to implement this wholesale rate at the retail level. See Commonwealth of Virginia v. Tenneco, Inc., 538 F.2d 1026 (4th Cir. 1976) (Federal Power Commission has expertise to resolve gas curtailment problem and also has primary jurisdiction) and 5 B. Mezines, J. Stein, & J. Gruff, Administrative Law, §47.01 et. seq. (1983 & Supp. 1983). See also United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956) (Doctrine applied after determination that issues regarding reasonableness and construction of a rate so intertwined as to preclude artificial and ineffectual separation).

Application of the related doctrine of ripeness and finality leads to the same conclusion in this case. That is, even though FERC may have collaterally decided

that the amended agreement constitutes a formula rate, no action - and thus no final action - has been taken to allow judicial review by the Minnesota court. See also Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (Court developed standards of fitness of issues for judicial review and hardship to the parties due to withholding judicial review). See also United States v. Public Utilities Commission of California, 345 U.S. 295, 318 (1953) (Matter not ripe for judicial review where no record evidence of separate gas sales). See also 5. B. Mezines, J. Stein & J. Gruff, Administrative Law, §48.01 et seq. (1983 & Supp. 1983).

By merely stating that the amended agreement establishes a formula rate without implementing such rate, FERC has not yet exercised its untested authority. If it is a preemptive "wholesale rate," as the Minnesota court has said, then FERC would be the agency to implement such a rate. 16 U.S.C. §824e(a) (1976, Supp. V 1981); Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976). Even if it may tend to agree that a wholesale rate has been established, this Court should still defer the judicial pronouncement by the Minnesota court until such time as FERC attempts to exercise some authority in the matter.

CONCLUSION

No exception to the fundamental rule of State regulation over retail electric service should be drawn. However, if an exception might otherwise be made, utilities and FERC should not be allowed to proceed in such a piecemeal fashion under these circumstances.

If the Minnesota decision is allowed to stand, State regulators can expect to see utilities with integrated systems and even others circumventing State retail regulation by forming wholly-owned subsidiaries, filing coordinating agreements, and thereby attempting to exempt a variety of rate matters from State regulatory scrutiny to the detriment of ratepayers. Such agreements might include, for example, all Construction Work In Progress funds and abandoned plant costs. This Court would likely be called upon again and again to distinguish and clarify jurisdictional boundaries heretofore clearly delineated.

For the foregoing reasons, NASUCA as amicus curiae prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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